89-1687

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1989

No._____

THOMAS E. SCHINDELAR,

Petitioner,
v.

ZENON ZAWADZKI and THERESA ZAWADZKI, his wife,
and FRED E. RUTH and ELLA RUTH, his wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION

Kathryn Schindelar, Esq.
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(201) 786 6242
Attorney for Petitioner

STATEMENT OF QUESTIONS PRESENTED

1. Should the Supreme Court grant certiorari to review the decision of the Supreme Court of New Jersey upholding the decision of the Appellate Division of the Superior Court of New Jersey, that the recordation in the Road Vacation Book of the County of a 1937 Road Vacation Ordinance enacted by a municipality to vacate "public rights" in a portion of a state highway over which existed the sole access to petitioner's 35-acre parcel of rural, undeveloped land (such highway having previously been relocated in 1922 pursuant to N.J.S.A. §20:1-1 et. seq. without condemnation action against petitioner's grantors) also constitute notice to the world that "private rights of access" are also being affected?

2. Does such ordinance constitute a condemnation, and if so, does it constitute a 'taking' of private rights without condemnation nor compensation in violation of the

due process clause of the State and Federal constitutions?

3. Did the finding of the Chancery Court on November 18, 1987, upheld by the New Jersey Supreme Court on November 1, 1989, itself landlock and extinguish the private access right of petitioner thereby constituting a taking of property without compensation and without affording petitioner a clear and adequate remedy?

LIST OF PARTIES

The capiton of this case in this Court contains the names of all parties to the proceeding in the Chancery Division, Superior Court of New Jersey, held on November 16, 1987.

TABLE OF CONTENTS

AUTHORITIES

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On Petition for Writ of Certiorari to the Superior Court of New Jersey: Appellate Division

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JURISDICTIONAL STATEMENT

Thomas E. Schindelar, Petitioner, seeks a Writ of Certiorari to the New Jersey Supreme Court, upon a final judgment therefrom upholding the finding of the Chancery Division, Superior Court of New Jersey, that Petitioner's private right of access over a public road was vacated by a 1937 municipal

Ordinance vacating only "public rights" in said road, and that the recordation of such ordinance in the Road Vacation Book of the County constituted notice, which decision Petitioner asserts violates the Fifth and Fourteenth Amendments to the United States Constitution, and the N.J. Constitution.

OPINIONS BELOW

The Opinion of the Chancery Court dated November 18, 1987, is attached as Appendix A. The unpublished decision of the Appellate Division, dated April 20, 1989, is attached as Appendix B. The Decision of the Supreme Court of New Jersey filed July 13, 1989 is attached as Appendix C. The final Order of the Supreme Court of New Jersey filed November 1, 1989, is attached as Appendix D.

JURISDICTION

The Supreme Court of New Jersey, on November 1, 1989, filed a Final Order dated October 31, 1989, denying Petitioner's Motion for

Reconsideration of the Supreme Court's decision of July 11, 1989, filed July 13, 1989. This appeal is timely and jursidiction is invoked under 28 U.S.C.A. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment provides that private property shall not be taken without due process of law and compensation. N.J.S.A. §2A:14-11 is a statute of limitation as to the establishment of private rights in vacated municipal road and is attached hereto as Appendix E.

STATEMENT OF THE CASE

In 1937 the Township of Fredon, located in Sussex County, New Jersey, enacted and passed a municipal ordinance vacating the "public rights" in a portion of the Great Road which had been surveyed and recorded in the Road Book of Sussex County on October 9,

1765, by order of the Freeholders of the County of Sussex, New Jersey, a Colony of England. The Great Road exists to this date as laid out in 1765, except for the portions realigned in 1922, which did not terminate access to the subject property, nor were condemnation proceedings instituted against anyone in the chain of title of the subject property. Since 1929, the Great Road has been known as New Jersey Highway 94. Said Great Road had bisected a 101acre parcel which belonged to the Budd family, petitioner's grantors, since 1830. On March 12, 1870, by Final Decree of the Chancery Court of New Jersey, the 101-acre parcel was partitioned among the heirs of an elder Budd. At that time, petitioner's grantors' interests as heirs was determined to be a 35 acre parcel. The remaining 66 acre parcel was awarded to other Budd siblings not in the subject chain of title.

In partitioning the 101 acre parcel, the Chancellor, in 1870, assured each heir

access to his property over the "Great Road." The access to the 35-acre parcel has always been over the Great Road. Further, that 35 acre parcel has remained intact from 1870 to this date, and was transferred to Petitioner's family in 1965 in consideration for extensive legal and surveying services performed by petitioner's father who died in 1974.

In 1922, a realignment of the "Great Road" (then known as Route 8, and since 1929, known as Route 94) was undertaken by the County of Sussex and completed by the State of New Jersey. No condemnation proceedings were instituted by either government entity against Petitioner's grantors or others in that chain of title. The relocation of the road was completed by 1929, approximately 8 years prior to the enactment of the Road Vacation Ordinance of the Township of Fredon limited to "public rights" in portions of the Great Road. No other action was taken by the Township of Fredon in regard to the vacation

except to record same in Road Vacation Book of the County of Sussex. No court proceedings were instituted against petitioner's grantors.

Petitioner and his grantors have always accessed the property over the old road, and have always considered that they had a private right of access over the old road to their property. Further, and contrary to the erroneous and mistaken findings of the chancery court, Petitioner, his father, and his sister, and others, used the old roadbed for access to the property continually since their acquisition in 1965. The roadbed was and still is visible.

On January 14, 1986, Plaintiff filed a suit in the Sussex County Superior Court, Chancery Division, seeking an Order to file and record a survey of the private access over the old road. In December, 1987, the Chancery court, held that the 1937 road vacation limited to public rights by the Township of Fredon also took the only access and the

private right of access of petitioner's grantors to the 35 acres of undeveloped rural property. The Court held that the recording of the Vacation Ordinance limited to public rights constituted notice to petitioner's grantors and the world that the private rights of access were also taken. Such finding of the Chancery court in 1987 rendered the property landlocked.

It is petitioner's position that the property became landlocked by the decision of the chancery court in 1987, which was upheld by the New Jersey Supreme Court by Final Order dated October 31, 1989, filed November 1, 1989.

The decision of the chancery court, made 50 years after the vacation of the public rights in the old road, finding that private rights are also taken is contrary to established New Jersey law that a road vacation takes only public rights and that private rights of access remain unaffected as to abutting landowners whose sole access is over

said vacated road. N.J.S.A. §2A:14-11. Highway Holding Co. v Yara Engineering Corp. 22 N.J.L. 119, (1956). Further, since the ordinance on its face was limited to public rights it is petitioner's position that no notice was afforded petitioner's grantors that their private rights were being taken. In fact, nothing further was done. Such inaction is contrary to the due process provisions for notice and hearing on compensation.

Neither the Chancery decision, nor the unpublished Opinion of the Appellate Division disclose any clear and adequate remedy available to petitioner under either New Jersey case law, or the statutes of the State of New Jersey.

These decisions have effected all vacated roads in New Jersey which provide private access to otherwise landlocked property. Petitioner's 35 acre parcel can not be developed. It must be noted that 77 % of the

total acreage of Fredon Township is farmland and only 2 % thereof is allocated for highways and commercial development. (Sussex County Chamber of Commerce, 1988, Vol. 3, No. 1, page 77).

Contemporaneous with petitioner filing the complaint seeking an order to record a survey of his private access, the New Jersey State Planning Commission authorized legislation to implement a statewide development plan, or statewide zoning ordinance. Since 1985, the State has been seeking to enact such legislation which is designed to limit development of rural areas throughout the state, including Fredon Township.

Petitioner is an individual without great resources. He has been deprived of the opportunity to develope the property and is now faced with high real estate taxes on landlocked property and little opportunity for sale. He has expended in excess of $30,000 for attorney fees (prior to the

undersigned and sister of petitioner appearing in the matter) and $15,000 in survey costs. Yet, petitioner cannot even walk to his property.

The decision of the the courts of New Jersey in petitioner's case have been contrary to existing New Jersey law that (a) it is against public policy to landlock property, (b) the vacation of public rights in a road does not affect private rights, and (c) taking of private property by a government entity requires compensation and due process.

Petitioner in good faith beleives that the decisions of the court which are contrary to established law and which provide him with no clear and adequate remedy for compensation have been influenced by the policies of the State of New Jersey and its political subdivisions to limit rural development. He petitions this Court in a genuine belief that this trend toward limiting growth unconstitutionally is becoming prevalent as an accepted

norm and that it can only be deterred by the decision of this Court to address the issues raised in the matter.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Prologue.

The issues raised by this Petition for Certiorari are substantial, and are of general public importance and should be addressed by the Supreme Court.

The issues involved concern not only the 'taking' of property, but more consisely, when, in fact, the property was 'taken.' Petitioner presents three theories on when the 'taking' occurred.

The first is that the 'taking' occurred in 1937 upon the recordation of the road vacation ordinance limited on its face to public rights. The Chancery Court held that such ordinance limited on its face to public rights can also take private access rights thereby rendering the property landlocked.

However, this decision is contrary to established New Jersey law that the vacation of a public street does not impair private rights therein. Highway Holding Co. v Yara Engineering Corp., supra.; N.J.S.A. §2A:14-11.

The second 'taking' may have occurred upon the enactment of N.J.S.A. §2A:14-11 in 1951, which is a statute of limitations for the time private parties may assert private rights in vacated municipal roads to one year. However, this statute expressly excepts and excludes therefrom abutters and those whose sole access is over the vacated road. (See Appendix E). Petitioner herein is excepted from the operation of said statute.

The third 'taking' possibility is based upon the assumption that the New Jersey Supreme Court's decision constitutes the state action which in and of itself constitutes the 'taking'. If such is the case, and

the Judgment is a valid pronouncement of the New Jersey Supreme Court, petitioner is then entitled to a clear and adequate remedy for compensation. None such remedy has been provided by the New Jersey Supreme Court, nor by the Statutes of the State of New Jersey. Thus the judgment itself is unconstitutional for failing to provide a clear and adequate remedy, First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 107 S.Ct. 2378 (1987); Nollan v California Coastal COmmission, 107 S.Ct. 3141 (1987); or adequate notice. Texaco, Inc. v Short, 454 U.S. 516 (1982).

Incident to the taking issue, the court may also have created by its decisionin 1987 a retroactive cause of action against the municipal for what had not been a "wrong" in 1937; and further, in misconstruing the statute of limitations as a cause of action, purported to eliminate private causes of action to establish private rights in vacated

municipal roads.

Intrinsically, the Chancery and Appellate decisions have found that a Road Vacation Ordinance can be elevated to the status of a condemnation proceeding without adherence to N.J. S.A. §20:1-1 et.seq. and Article 1, ¶20, N.J. Constitution.

B. The decision of the New Jersey Supreme Court that the recordation of a municipal Road Vacation Ordinance limited on its face to public rights also constitutes notice to the world that private rights of access are also being taken raises substantial constitutional questions of public importance.

The tacit holding of the N.J. Supreme Court places the recording of a a Road Vacation Ordinance at the same status as a condemnation proceeding without the necessity of instituting proceedings to condemn or to determine compensation. Although no 'actual notice' is imparted to anyone, constructive

notice is implied. However, this would require the aggreived party to commence and 'inverse' condemnation action against the vacating authority. Such a reading of the law is contrary to the due process clause of the Fifth and Fourteenth amendments of the U.S. Constitution.

Although the Chancery Court mistakenly implied that petitioner may have an action for money damages based on the statute of limitations N.J.S.A. §2A:14-11, previously set forth, supra., p. 7, that statute does not so provide. The Appellate Division's opinion did not address the issue as to petitioner's remedy and the Supreme Court did not issue any opinion at all beyond a simple denial of the request for certification.

What is involved here is the total denial by the Court of access to the property which denial occurred without notice or compensation, and without providing petitioner any remedy at all.

Petitioner has sought relief and requested a remedy from the New Jersey Court system. He has sought out of court alternate relief. To no avail. Petitioner finds it incomprehensible that his lawful invocation of the justice system has gone without remedy, and that each decision ignores the applicable law and the injustice done him.

Further, the decision of both the chancery and appellate divisions are based on erroneous and inaccurate assumptions of facts not substantiated by the record.

Petitioner's family has resided in Sussex County since before 1900, and it is his belief that the development of Sussex County in general, and Fredon Township, in particular, is being retarded by the actions of the State legislature and the municipality of Fredon. In fact, Fredon Township is quoted in the Sussex County Chamber of Commerce publication, supra, p. 77 as follows:

"Fredon is striving to maintain its

> rural character with land laws which require a minimum of three acre building lots for new residents and which allocates some 77 percent of its total acreage as farmland and 2 percent for highways and commercial development....Fredon is one of the lowest density communities in the county with only 126 people per square mile. Per capita income is second highest in the county...."

The New Jersey State Development and Redevelopment Plan, adopted in 1985 is currently in the cross-acceptance phase which is the process of comparing the county and municpal plans to the Preliminary State Plan. Although the State agency refuse to characterize the plan as a state zoning ordinance that is exactly what it is.

The Sussex County Chamber of Commerce has issued an summary of concerns regarding the State wide development/zoning plan and authorized an in-depth study issued November

14, 1989. It specifically stated that the State Plan tended to retard growth in rural areas, making life in Sussex County less desirable. In regard to farm and agricultural property, of which Fredon Township is 77% comprised of, the Chamber said:

> "Farmers and landowners whose property is designated as agricultural will be less able to use their land as collateral for business loans or sell it at a price that reflects the higher development capacity of the land.... Finally, the plan may contribute to an increase in local property taxes because of limitations of future growth of the tax base; and an increasing need for higher county and municipal taxes to support existing services and to replace any decline in state funding for road and infrastructure improvements."

The decision of the Supreme Court has totally and substantially deprived petitioner

of all use of his property by retroactively landlocking the property. Such action is obviously against public policy and can only be explained by viewing the statewide public policy toward restricting development, which is indicated by the State Plan for Development and foregoing discussion.

The decision of the Court has been inherently unfair. It can only be remedied by the granting of petitioner's writ of certiorari.

CONCLUSION

Wherefore, Petitioner requests his Honorable Court to grant the Writ of Certiorari and to review the final order of the New Jersey Supreme Court, upholding the decision of the Superior Court, Appellate Division, and to grant such other relief as may be appropriate.

Dated: March , 1990.

Respectfully submitted,

Kathryn Schindelar
Attorney for Petitioner

APPENDIX A

SUPERIOR COURT OF NEW JERSEY

Chambers of
Kenneth C. MacKenzie
Judge

Courthouse
Morristown, N.J. 07960
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November 18, 1987

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RE: Schindelar v Zawadski, et al
Docket No. C-1212-86

Dear Counsel:

When this case was called to trial on November 16, 1987, counsel presented the Court with a stipulation of facts (Exhibit J-1) and indicated that there was no need for a plenary hearing. Each attorney also submitted without oral argument on the legal points discussed in his respective trial brief. Mr. Hughes, with prior permission of the Court, later sent in a supplemental letter memorandum, as did Mr. Lipstein.

The Court accepts the stipulation of facts, as supplemented by the oral agreement between counsel that the Schidelar [sic] and Diocese of Paterson lands are undeveloped, as its findings. Those facts are accordingly incorporated by reference into this opinion, which set forth my legal conclusions.

This is an action for a declaratory judgment. Plaintiff contends that he is entitled to relief from his landlocked property by means of an easement of necessity over the old, vacated public road. Defendants dispute his right to such a

declaration. For reasons hereinafter stated, the Court finds that the law supports defendants' position, given the discrete facts of this case.

Plaintiff first contends that he has a perpetual and indefeasible right of access to his property over the former public road. This argument is based on his understand of State by Comm-issioner of Transportation v Birch, 115 N.J. Super. 457 (App.Div. 1971). Relying on Birch, plaintiff asserts a right of ingress and egress over that portion of the property of defendants which formerly was the roadbed for Route 8 prior to its vacation by Fredon Township on June 28, 1937.

Prior to the vacation of the Route 8 over 50 years ago, the Ruths' predecessors in title owned the property on either side of the roadbed. The effect of the vacation of the road was to vest them with a fee title in what had been the public road. See, e.g., Palisades Properties, Inc. v Brunetti, 44 N.J. 117 (1965), Stockhold v Jackson Twp.,

136 N.J.L. 264 (E&A 1947). The fee interest in Ruths' predecessors is not subject to the rights of the public or of neighboring property owners.

Birch does not support plaintiff's argument because the facts in that case were very different from those here. Birch was a condemnation case where the major issue on appeal was whether the condemnees had to comply with the local subdivision ordinance in building an access road to their property. Involved peripherally was a discussion of those circumstances when a dedication gives rise to private rights. Id at p. 464. Where one evidences an intention to dedicate a street by selling lots with reference to a map, a purchaser who takes title to a lot abutting such a street acquires a right of access to his lot over the dedicated street even in the absence of acceptance of the street by the municipality. The Birch court, however, did not reach the issue what happens to those rights to use the street by when the

street is vacated by the municipality. Id. at p. 465. In any event, plaintiff here did not purchase his property in reliance upon a map which showed a dedicated street. His purchase was made long after Fredon Township had vacated Route 8 and he was on notice through his title search of that vacation.

Research has disclosed no decisional authority for plaintiff's proposition that one property owner is entitled to a right of way across a vacated public roadway as to which a continguous property owner now holds the fee title. The reported cases on the subject suggest strongly that such a landlocked property owner, left without road access by the vacation of a public roadway, is to sue the municipality for money damages. See, e.g., Highway Holding Co. v Yara Engineering Co., 22 N.J. 119 (1956); Mueller v N.J. Highway Authority, 59 N.J.Super 583 (App. Div. 1960); Rangelli v Wayne Tp. 43 N.J. Super 136 (Law.Div. 1956). There is also statutory authority for a damage suit

against the municipality which vacates public rights in roadways. N.J.S.A. 2A:14-11. In view of the absence of a statute of limitation against a private landowner who claims that his property rights have been damaged by the vacation, Mr. Schindelar may have a cause of action against Fredon Township. But see Mueller v N.J. Highway Auth., supra at p. 593. Laches may apply as a defense.

The Court is satisfied that plaintiff purchased the property with knowledge that it was landlocked. The deed into him (and his wife) was dated July 31, 1965 which was 28 years after the road was vacated. 1 The grantors were the remaining members of the Budd family. The Budds had owned the property since 1830. The deed to plaintiff does not refer to an easement or to a reservation of a right of way in favor of the property over the old roadbed. The old road is and has been since plaintiff took title unused. Under these circumstances, plaintiff could not justifiably have expected that his pro-

perty was anything but landlocked. Furthermore, the record does not disclose that he ever asserted any rights to the former roadbed, either by bringing a lawsuit or by actual use of the roadbed for access to and from his lands. Accordingly, the Court concludes that plaintiff has not proven his entitlement to a private right to use the old roadbed.

On a tangential note, plaintiff has asserted that the vacation of the old road was improper. It is too late, in 1987, for a landowner who has held title to 22 years to challenge the propriety of the vacation of the roadway. The township is not a party to this litigation, as it would necessarily have to be, if the Court were to consider whether its governing body acted under statutory authority in 1937. In addition, plaintiff sat on whatever rights he may have to contest the township ordinance for too long a period of time. This challenge is without merit.

Plaintiff also claims an easement by

necessity over the lands of Ruths and Zawadskis. [sic]. The general rule by which an easement of necessity arise is stated in Corpus Juris Secundum Easements, §35, pp. 695-99, as follows:

> ways [sic] of necessity cannot be founsded on an express grant, but are dependent upon an implied grant or reservation, and cannot exist where there was never any unity of ownership of the alleged dominant and servient estates, for no one can have a way of necessity over the lands of a stranger. Necessity alone without reference to any relations between the respective owners of the land is not sufficient to create this right...A way of necessity can be implied only when the necessity existed at the time of the grant, in other words, the necessity is to be determined from the conditions existing at the time of the conveyance. The necessity may not be created by the party claiming the right

of way.

New Jersey has adopted the general rule. See, e.g., Poulos v Dover Boiler & Plate Fabricators, 5 N.J. 580, 587 (1950: Ghen v Piasecki , 172 N.J Super. 35, 41 (App.Div. 1980).

There is no common grantor in the chain of title between plaintiff and either defendants since the adoption of the ordinance which vacated the public roadway, no such easement arises. Thus, inasmuch as "a way of necessity arises only in relation to condition exisiting [sic] at the time of severance of common ownerships," Adams v Cole, supra, [sic] at p. 133, there can be no way of necessity imposed over the lands of defendants. The crucial severance of title by the Budd family as it applies to the lands at issue here took place before 1937. Hence no easement by necessity can be decreed.

Although not pleaded as such, plaintiff appears also to argue that an easement arises from the language in the 1957 deed into

Ruths. He points to the following language as the basis for this assertion:

> The above described tract is subject to any right of way that other parties may have along the first line in the above described tract. [emphasis supplied].

The "first line" referred to in that sentence from the deed is the old road. The sentence is copied, word of word, from the 1949 deed into Ruths' grantor, one Hunt who had taken title from the Budd family before the road vacation.

The reference cannot be construed as creating an easement. Its meaning must be limited to putting the grantees on notice that someone may have user rights over the old roadway. This Court has already determined that Mr. Schindelar did not obtain a private right of way over the vacated turnpike when to took title. Hence, this deed language cannot serve as a bootstrap to pull him up to a legal status he otherwise is not entitled to.. There may be someone who has

such a right of way, but that party is not plaintiff.

Although it is not necessary to the Court's determiniation, there is an equity in favor of the Ruths which would weight against an easement over their lands as sought by plaintiff. The Ruths live in a house which is sited toward the rear of their lot, near the boundary line with Mr. Schindelar's property. If the Court were to find that plaintiff were entitled to an easement over the old turnpike road, the Ruths home would only lie 15 feet from the right of way. That would be just too close for any reasonable enjoyment of their house, since it is inferred that plaintiff intends to develope his large tract for residential purposes. One can easily imagine the effect that flow of cars in and out of the future development would have on the property value of Ruths' lands.

To one who might say that the Court has left plaintiff without a remedy, I would

first point out that he got himself into his dilemma with his eyes wide open. He has no one to blame but himself. But, in any event, it is undisputed that Mr. Schindelar, had, and may still have the opportunity to purchase his access to public roadways over the lands of two other adjoinging landowners who are not parties now to this litigation. The Court does not address whether their absence from the case presents an independent basis for dismissing the complaint.2

Mr. Hughes will submit a form of judgment under the five-day rule.

Very truly yours,

Kenneth C. MacKenzie, J.S.C.

KCM:jcl

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1 According to the tax stamps on the deed, the purchase price for plaintiff's large tract was $1,000 or so. Plaintiff's father, an attorney and an engineer, represented the grantors.

2 Defendants argued that N.J.S.A. 2A:16-51 and R. 4:28-1(a)(1) precludes granting any relief to plaintiff because of his failure to proceed against supposedly indispensible parties.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY

Appellate Division

A-2136-87T8

THOMAS E. SCHINDELAR,

Plaintiff-Appellant,

v.

ZENON ZAWADZKI and THERESA ZAWADZKI, his wife, FRED W. RUTH and ELLA RUTH, his wife,

Defendants-Respondents,

and

GEORGE VAN HONR and GRACE H. VAN HOR, his wife, GERARD A. MAROTTA, JOHN C. LUCAS, JR., M.D. and BARBARA LUCAS, his wife, and RAYMOND MICHAELS and ROMAN CATHOLIC DIOCESE OF PATERSON,

Defendants.

Original filed April 20, 1989

Emille R. Cox, Esq.

Acting Clerk

Argued February 16, 1989 - Decided Ap 20, 1989

Before Judges Brody, Ashbey and Skillman.

On appeal from Superior Court of New Jersey, Chancery Division, Sussex County

Kathryn A. Schindelar argued the cause for appellant.

Howard D. Lipstein argued the cause for respondents Zawadzki.

Richard H. Hughes argued the cause for respondents Ruth.

PER CURIAM:

Plaintiff brought this action for a judgment declaring that he has an easement of necessity over lands of defendants, his neighbors to the east and west, where a 66-foot wide portion of the Great Road, an east-west colonial road, had been located until it was vacated by the Township of Fredon in 1937. The vacated portion of the old road curved north and then south. It was supplanted by a state highway that generally follows the old road but runs south of the vacated portion to eliminate the bow. The vacation of the road had the effect of landlocking plaintiff's property, then owned

by predecessors in title, which abutted part of the northerly side of the vacated portion. The claimed easement would restore the vacated portion of the old road west of plaintiff's property to give him access to the state highway.

The present appeal is from a December 1987 judgment entered following a bench trial based upon a written stipulation of facts. The trial judge found in favor of defendants Zenon and Theresa Zawadzki and Fred and Ella Ruth (defendant).1 When the portion of the Great Road was vacated, the Zawadzkis' predecessors in title owned property abutting part of the northerly side of the vacated portion immediately west of plaintiff's property, and the Ruths' predecessors in title owned property abutting part of the southerly side of the vacated portion immediately south and west of plaintiff's property. The issue raised by plaintiff is whether, despite the 1937 vacation, plaintiff's property enjoys an easement over the Zawadzki and Ruth proper-

ties where the Great Road had been.

Plaintiff acquired title to his property in 1966. The deed description makes no reference to the Great Road. The Zawadzkis acquired title to their 7.33 acre property in 1982. The description in their deed makes no reference to the Great Road.

The Ruths acquired title to their .98 acre property in 1957. The description in their deed refers to the Great Road in locating the beginning point and the first course. Following the description is the following:

> The above described tract is subject to any right of way that other parties may have along the first line of the above described tract.

Assuming that this reference could refer to the easement claimed by plaintiff, the expression "may have" makes it clear that the language gives plaintiff nothing that his predecessors in title did not already have.

The language does not help us decide whether plaintiff's predecessors in title retained an easement in the Great Road when it was vacated in 1937.

We first reject plaintiff's claim, advanced in its amended complaint, that it has a way of necessity over defendants' lands. "A way of necessity arises only when there has been unity of ownership and a subsequent severance of title resulting in the grantor or grantee owning a parcel which is landlocked." Ghen v Piasecki, 172 N.J. Super. 35, 41 (App.Div. 1980). Plaintiff's property became landlocked because of the vacation of the Great Road, not because a grantor common to plaintiff and defendants rendered it landlocked by severance of title.

Plaintiff argues that when the township vacated the Great Road, his predecessors in title retained a private easement in the road that gave his property access to the state highway, and that he succeeds to that ease-

ment. Plaintiff's and defendants' property was at one time part of a single large tract that contained the later vacated portion of the Great Road. When it was divided into the three parcels now owned by the parties, each parcel was deliberately bounded in part by the Great Road in order to assure access to the street system. The later vacation in 1937 defeated whatever reasonable expectation of access to the nearest existing street plaintiff's predecessors in title had at that time. That expectation is a property right. See Highway Holding Co. v Yara Engineering Corp., 22 N.J. 119 (1956).

> ...[T]he purchaser of a lot upon a street so dedicated acquires a perpetual and indefeasible right of access to his lot over the same, or at least over so much as leads from his lot to the next adjoining public street on each side, whether the same be accepted and adapted [sic] by the public as a highway or not, and retains

> it, if after acceptance the same be abandoned by the public as a public highway. [Id. at 134.]

That expectation, however, is not a property interest that survives the vacation, but is a property interest that is taken by the vacation and therefore must, under the constitution, be paid for by the vacating authority. Id. at 135. The streets in Highway Holding were two paper streets that had been dedicated by selling lots along them with reference to a filed map that showed the streets. The municipality accepted the streets, but then vacated them before they were improved. Ultimately the court held that the property owners abutting the vacated streets did not lose access to the street system by the vacation because they had other means of access. But in discussing the issues the court made it clear that had the vacation resulted in a denial of access, the remedy would be damages, not a continued private use of the vacated streets.

It is the damage to the user of the property that is of the essence of this problem from a practical constitutional standpoint. [Id. 134.]

* * *

Where a street has been dedicated as a public street by the filing of a map and its subsequent incorporation by reference in deeds of conveyance, and such street is accepted as a public highway by proper authority, if the street is subsequently vacated in accordance with law, the owners of property on the filed map are constitutionally entitled to compensation only for the actual damage to the user of their property resulting from such vacation. [Id. at 135.]

* * *

...[W]here the street was subsequently vacated by public authority and the owner had made substantial improvements upon the abutting property, and the result of the vacation was that he was left without access to a public street, then such owner has a right constitutionally to recover for such

> damage based upon the assertion of his private right in the street as distinguished from the public right in the street. [Id. at 135-136.]

There is good reason for not permitting the private right of access to the street system to continue in the form of a perpetual easement in the vacated street. A street is often vacated because its use is no longer consistent with the development or planned development of the properties it was intended to serve. To perpetuate its use after vacation in such instances would interfere with the development of surrounding properties. Here, since the 1937 vacation defendants were free to orient the use or development of their propertiews to the new protion of the state highway and to use the roadbed of the former Great Road without regard to the fact that it had once been a street.

We are thus brought to the questions which the court did not have to answer in Highway Holding, i.e. [sic], where a munici-

pality vacating a street has not paid just compensation to an abutting property owner who thereby lost all access to the street system, must the owners whose property had abutted the vacated street pay part or all of the fair compensation that the municipality should have paid in order to clear title to their property? We also need not answer the question.

The written stipulation that constitutes the factual record in this matter does not include the use or the reasonably foreseeable use of the property in 1937 from which an appraisal could be made of the value, if any, of the lost access. Absence of such evidence might explain why no claim was ever made in 1937. For that matter, the stipulation does not state whether the township paid compensation to plaintiff's predecessors in title.

> ...[T]he public policy of this State favors alienation of property and its ready marketability and it seems to us

> it necessarily does not encourage a recognition of abstract claims of defects in title when the damage to the user of the property is highly speculative, uncertain and in some instances almost microscopic. [Highway Holding Co., 22 N.J. at 133.]

We need not consider whether Plaintiff's claim is barred by laches, limitations or his purchase with notice. Regarding the last point, however, we note that plaintiff had notice of the recorded vacation ordinance when he acquired the property in 1966. In Mueller v N.J. Highway Authority, 59 N.J.Super. 583, 593-594 (App.Div. 1960), we said:

> The photographs in evidence reveal that the portion of Roosevelt Avenue in front of lots 21 and 22 is now apparently covered over with grass and is not being traversed by motor vehicles. If this was the case [when

> plaintiffs acquired the lots] in 1947, and no other basis for a legal right existed, plaintiffs could not justifiably have expected that these lots were anything but landlocked property, and they might therefore not be entitled to damages.

The other issues raised are clearly without merit. R. 2:11-3(e)(1)(E).

Affirmed.

R. Emille Cox
Acting Clerk

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1 In April 1987 another trial judge had entered a order for partial summary judgment in favor of defendants John and Barbara Lucas, and George and Grace Van Horn whose predecessors in title owned property abutting the Great Road east of plaintiff's property. Plaintiff does not appeal from that judgment. He voluntarily dismissed his claims against the remaining defendants.

APPENDIX C

SUPREME COURT OF NEW JERSEY

C-1275 September Term 1988

30,527

THOMAS E. SCHINDELAR,

Plaintiff-Petitioner, Filed July 13, 1989

vs. On Petition for Certification

ZENON ZAWADSKI, et. us, et. al.,

Defendants-Respondents,

and

GEORGE VAN HORN, et.us., et al.s

Defendants.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-2136-87T8 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 11th day of July, 1989.

Stephen Townsend

Clerk of the Supreme Court

APPENDIX D

SUPREME COURT OF NEW JERSEY

M-329/330 September Term 1989

30,529

THOMAS E. SCHINDELAR,

Plaintiff-Movant,

Filed November 1, 1989

vs. ORDER

ZENON ZAWADAKI, et.ux., et.al.,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a motion for reconsideration as within time (M-329) is granted; and it is further

ORDERED that the motion for reconsideration (M-330) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 31st day of October, 1989.

Stephen Townsend

Clerk of the Supreme Court

APPENDIX E

N.J.S.A. §2A:14-11.

Whenever any municipality has heretofore adopted, or shall hereafter adopt, any ordinance vacating, extinguishing, or releasing the public rights in any road, street, avenue, public highway lane, alley, path, park, square or pleasure ground, or any part thereof, any person or persons having or claiming any right, title or interest in such road, street, avenue, public highway, lane, alley, path, park, square or pleasure grounds, or any part thereof, or the lands included therein, in which said public rights have been vacated, extinquished or released, shall bring his action or actions respecting the same within 1 year of the date of the adoption of such ordinance, or in case such ordinance shall have been adopted prior to July 3, 1950, then before July 3, 1951, and not otherwise; provided, however, that this

section shall not apply to any person or persons owning lands, of [sic] any interest therein, abutting any part of such road, street, avenue, public highway, lane, alley or path in which the public rights have been vacated, extinguished or released, or whose right of ingress and egress to a public street or highway is solely over such road, street, avenue, public highway, lane, alley or path in which the public rights were vacated, extinguished or released.